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No.

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IN THE

Supreme Court of the United States

October Term, 1984

JAMES J. CALLY,

Petitioner,

vs.

WALTER E. HOFFMAN, United States District Judge For The Eastern District Of Virginia, Sitting As A Visiting Judge In The Middle District of Florida, Orlando Division,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Questions Presented.

1. Whether or not the District Court had jurisdiction to reconsider its final judgment of acquittal?

2. Whether or not the District Court violated the Double Jeopardy Clause by, in effect, superimposing a bench trial after it had initially acquitted petitioner on insufficiency of the evidence?

3. Whether or not it is beyond the scope of the District Court to sentence the petitioner, when, in fact, it had acquitted him?

4. Whether or not District Court may refuse to execute a valid judgment of acquittal, after the same had been entered and docketed in the said District Court?

5. Whether or not the said District Court acted properly in entertaining a motion for reconsideration beyond the time within which to do so?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

JAMES J. CALLY,

Petitioner,

vs.

WALTER E. HOFFMAN, United States District Judge For The Eastern District of Virginia, Sitting As A Visiting Judge In the Middle District Of Florida, Orlando Division,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Petitioner, James J. Cally, respectfully prays that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Eleventh Circuit entered in this case on October 25, 1984, affirming its order of denial of the writ of mandamus against United States District Court Judge Walter E. Hoffman sitting by designation in the Middle District of Florida, Orlando Division, who is endeavoring to overturn a final judgment of acquittal entered and docketed on May 11, 1983 in the said District Court.

Petitioner had moved the Court of Appeals for the Eleventh Circuit for a writ of mandamus, which was proferred in the proposed decision of Judge Hoffman. On the said petition, the said Court denied the issuance of the writ on September 20, 1984 without any opinion. Thereafter, your petitioner re-petitioned for rehearing and suggested that rehearing be *en banc*. This application was likewise denied on October 25, 1984 summarily without any opinion.

Opinions Below.

The opinions of the Federal District Court for the Middle District of Florida, Orlando Division (Appellant's Appendix pp. 10-43) was written by District Judge Walter E. Hoffman reversing the judgment heretofore entered in the said District Court and endeavoring to superimpose his proposed judgment. Petition for Rehearing *en banc* (Appellant's Appendix pp. 53-62); Judgment of Acquittal (Appellant's Appendix pp. 44-52). The decision of the Eleventh Circuit Court of Appeals order is likewise attached (Appellant's Appendix pp. 63).

Statutes Involved.

The pertinent portions of the Fifth and Fourteenth Amendments to the United States Constitution and Statutes involved (Appendix B, *infra,* pp. 42a).

Statement of the Case.

James J. Cally, petitioner, was one of 14 defendants named in a 32-count indictment charging conspiracy and mail fraud. Mr. Cally was alleged to have conspired in a scheme to take advance fees from a would-be borrower, to-wit: one Rex Baker, whereas, in fact, the said Cally had nothing to do with him, either directly or indirectly. He

merely appeared at Mr. Cally's office on October 22, 1980 in the company of other persons who were doing business with Mr. Cally's client, Joseph LaSpesa. As a matter of fact, Mr. Baker testified that he said nothing except nodded his head during the entire matter.

The matter was assigned to the Honorable Judge Walter E. Hoffman, a United States District Judge for the Eastern District of Virginia, who was sitting by designation as a visiting judge in the Middle District of Florida, Orlando Division. The entire trial took upwards of ten [10] weeks to try. The matter was submitted to the jury for deliberation, and after four [4] days, the petitioner and others were found guilty, and specifically, your petitioner was found guilty on two [2] Counts, to-wit: Count 1 and Count 2 of the said indictment.

Thereafter, the Court fixed a time for all motions returnable on May 10, 1983. All arguments on the motions made were heard on the said date, and on the day of sentencing, May 11, 1983, the motion under Rule 29(c) of the Federal Rules of Criminal Procedure was granted by the District Court, thereby acquitting the petitioner, and a judgment was entered and docketed by the Court.

The copious notes taken by the Judge during the trial caused the Judge to set aside the jury verdict of guilty and thereby enter a judgment of acquittal, notwithstanding the jury verdict, because as the Judge stated, "that severances should have been granted and there is proof of multiple conspiracies" in the said action. It was the Court's conclusion that two conspiracies existed rather than one and there was insufficient nexus as between the two groups of conspirators, and this petitioner knew none of the parties except for Joseph LaSpesa. In addition thereto, Court found that the spillover effect of all the evidence had a "devastating" effect upon the petitioner herein.

Predicated upon the Court's May 11, 1983 entry of judgment, petitioner believed that he had been acquitted on the two Counts he was cited. This belief was further reinforced by the docket entry, which states: "The Court grants judgment of acquittal as to all defendants who stood trial."

However, on May 16, 1983, the Court filed a "Supplemental Memorandum" in which the Court stated it did not acquit all defendants on all Counts. Rather, he intended to "grant a Rule 29(c) motion as to the defendants Steven Serault, Aime Serault, LaSpesa, Cally and Murgo as to Counts One and Two, and to grant a new trial as to Murgo on all remaining Counts as to which he was convicted, and a new trial as to Gerhardt on Count Six". No court order was entered on this "Supplemental Memorandum" filed May 16, 1983. Perhaps the Judge realized Court had lost jurisdiction and that a possible double jeopardy issue had been injected. The purpose of the said memorandum was to give guidance to the Court of Appeals, which the Court assumed that the Government would file.

The Government did not appeal; instead it filed a motion for reconsideration thirty-one [31] days after the entry of judgment, the said motion being filed on June 10, 1983.

The petitioner herein challenged the said motion; nonetheless, the Judge, on July 7, 1983, ordered the filing of opposition papers. The Judge ordered that the transcript of a number of witnesses deemed pertinent to the issues be prepared and submitted, and briefs filed by each of the defendants. The hearing was set for February 4, 1984.

The Judge in a memorandum dated August 20, 1984, announced the Court's intention to vacate the judgment of

acquittal, and reinstate the jury verdict and enter judgments of guilty, and that a sentencing be set down. No order to this date has been filed.

The Court candidly admitted that its original judgment of acquittal dated May 11, 1983 was a blanket acquittal as to all defendants on all Counts, and that said judgments were entered due to insufficiency of the evidence. Regardless, the Court held that it had jurisdiction to reconsider its judgments and was not barred by double jeopardy from doing so.

Reasons for Granting Writ.

1. Where the District Court is without jurisdiction in vacating a judgment, the Court of Appeals must grant mandamus to compel reinstatement of such judgment. (See: *Delaware, L. & W.R. Co. vs. Rellstab,* 276 U.S. 1.) The Court there stated, "it certainly would be unjust to leave the case in the air, because the District Court had made an unwarranted attempt to set aside a judgment that it had no jurisdiction to touch." (See also: *Madden vs. Perry,* 264 F.2d 169; *Butcher & Sherred vs. Welsh,* 206 F.2d 259; and *Three J. Farms, Inc. vs. Alton Box Board Co.,* 602 F.2d 112.)

The Supreme Court has pointed out that it does not matter whether the District Court's act was right or wrong; if it exceeded its jurisdiction, mandamus is appropriate. (See: *In re Metropolitan Trust Company of the City of New York,* 218 U.S. 312.)

In the instant action, the District Court over-stepped its jurisdiction, once the judgment of acquittal had been entered.

2. The memorandum decision of the District Judge Hoffman should be reviewed because the constitutional

issues raised were completely ignored by the said Judge, all in violation of the Fifth Amendment and the Fourteenth Amendment. (See: *Ruby vs. Secretary of United States Navy,* 365 F.2d 385; *United States vs. Norton,* 539 F.2d 1082; and *United States vs. Mehrtens,* 494 F.2d 1172.)

3. The petitioner herein contends that because he was acquitted, the District Judge lacks the jurisdiction to sentence him. Properly, the remedy for the usurpation of jurisdiction is the writ of mandamus/prohibition. The District Court lacks the jurisdiction to disturb the final judgment of acquittal, although it has omitted to enforce the said judgment of acquittal. (See: *Whitlock's Estate vs. C. I. R.,* 547 F.2d 506, cert. denied 430 U.S. 916 [1976]; *Yablonski vs. United Mine Workers of America,* 454 F.2d 1036 [C.A.D.C.], cert. denied 406 U.S. 906 [1971]; *Bucolo vs. Adkins,* 424 U.S. 641 [1976]; and *In Re Olson,* 727 F.2d 1015 [11th Cir. 1984].)

4. The Supreme Court in *Berman vs. United States,* 302 U.S. 211 [1937] stated, that regardless whether a criminal or civil action, the same becomes final upon the termination of the litigation, and nothing remains to be done except what has been determined by the final judgment. (See: *Yeloushin vs. United States,* 313 F.2d 303 [5th Cir.], cert. denied 373 U.S. 912 [1963].) It is urged that the District Judge knew that the judgment of acquittal was a final judgment, because on May 16, 1983 the said Judge wrote a memorandum explaining the entry of judgment of acquittal on May 11, 1983 to the Court of Appeals as to the reason for his conclusionary finding in the judgment of acquittal.

5. The attempt of the District Court to retry this matter violates the Double Jeopardy Clause. (See: *Fong Foo vs. United States,* 369 U.S. 141 [1962].) Moreover, it is your petitioner's position that once a Judgment of Acquittal

had been entered, the District Court could not review on error or otherwise, without putting a defendant twice in jeopardy, thereby violating the Constitution. (See: *United States vs. Martin Linen Supply Co.,* 430 U.S. 564 [1977]; and *Sanabria vs. United States,* 437 U.S. 54 [1977].)

6. It is further urged that the District Judge did not have the authority to consider the motion for reconsideration and regard it as a rehearing petition by the said Judge, because the same was not timely made. The Judgment of Acquittal was entered and docketed on May 11, 1983 and the aforesaid motion was allegedly filed on June 10, 1983, the time elapsing more than thirty [30] days.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Memorandum of District Judge.

UNITED STATES DISTRICT COURT,

MIDDLE DISTRICT OF FLORIDA,

Orlando Division.

UNITED STATES OF AMERICA

vs.

VICTOR E. MURGO, *et al.*

No. 82-67-Orl-Cr-R(H)

The trial of the above case before a jury commenced on Monday, January 10, 1983, and, excluding the week beginning February 28, 1983, continued until the jury returned its verdicts on Wednesday, March 30, 1983.[1]

The indictment contained 32 counts, in which the defendant, Murgo, was named in all counts. In concise terms, the various Counts in the indictment included the following:

Count 1—a conspiracy charge alleging a scheme to defraud Rex Baker by the use of the mails.

[1] The case had been assigned to the undersigned, a visiting judge, sitting by designation for a period of five (5) weeks, or until his judicial duties had been completed. The actual trial time for this case was ten weeks and three days, same including three days and a portion of a fourth day for jury deliberation.

Count II—a conspiracy charge alleging the use of the mails to defraud Rex Baker.

Count III—all defendants were found not guilty on this Count.

Count IV—a conspiracy charge alleging a scheme to defraud Timothy Temple by use of the mails (while several original defendants were named in this Count, only Murgo and Williams[2] were actually tried to the jury; the others having either previously pled guilty or not being available for trial).

Count V—a conspiracy charge alleging the use of the mails to defraud Timothy Temple.

Count VI—a substantive count against Murgo and Sidney Gerhardt involving an alleged violation of 18 U.S.C. §2314.[3]

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[2]The jury did not reach an agreement as to the guilt or innocence of Williams on Counts IV or V, and his case was later disposed of by agreement. The Court directed a verdict for Williams on Counts I and II, and the jury found all defendants, including Williams, not guilty on Count III.

[3]In its final brief, the Government agrees that Gerhardt should be accorded a new trial (probably a concession to avoid the serious question as to whether the Court should have granted a severance as to Count VI, the only count in which Gerhardt is named). The Government has further represented to the Court that, if the Court grants a new trial as to Gerhardt, the Government will then move to dismiss the charges as to him. Both Murgo and Gerhardt were found guilty on Count VI. Since Gerhardt was not named as a co-conspirator under any of the five conspiracy counts stated in the indictment, and since the case against Murgo and Gerhardt on Count VI required only three days to present, it is apparent to the Court that a severance should have been granted to Gerhardt, or otherwise Count VI should have been severed rather than require Gerhardt to sit throughout the entire trial without further mentioning his name.

Counts VII, VIII, IX, X, XI, XII, XIV, XV, XVI, XVII, XVIII, XVIX, XX, XXI, XXII, XXIII, XXIV, XXV, and XXVI—these were substantive counts against Victor Murgo alone, alleging violations of 18 U.S.C. §2314 and 2.

Note: Count XIII and Counts XXVII through XXXII were dismissed during trial on motion of the Government, with prejudice.

Briefly stated, the acts of the defendants, who stand convicted by the verdicts returned, namely, Murgo, Stephen Sarault, Aime Sarault, LaSpesa, and Cally were in the nature of "con" men engaged in efforts to disgorge money from prospective borrowers who were interested in obtaining substantial loans for the purpose of constructing and operating various enterprises, such as motels, housing projects, etc. The defendants unquestionably had very little hope of ever finding sources of financing. Through the medium of advance fees or specific deposits of sums of money, the defendants, either singly or in cooperation with others, caused guarantees to be issued by "paper" insurance companies, offshore banks, and the like. The defendants "milked" the potential loan applicants as much as possible by holding them in expectation of ultimately receiving the approval of their loan requests. Certainly as to Murgo, Solomons, Uzzi, Attonito, Pollack, and the two Saraults,[4] there appears to have been a clear understanding that the potential investors would be passed from one to another in order that each defendant would receive his fair share of the advance fees or specific

[4]One Lawrence Mancini, an accountant ostensibly employed by the two Saraults and/or an offshore bank, was an original defendant in Counts I, II, and III. Like the others, he was found not guilty as to Count III. The jury did not agree as to his guilt or innocence on Counts I and II. At the post-trial motion hearing the Court granted his renewed motion for a directed verdict of acquittal. The Government does not contest this ruling.

deposits. The ultimate question resolves itself to the nexus between LaSpesa, Cally and Uzzi, on the one hand, and Murgo, Solomons, Uzzi, Attonito, Pollack, and the two Saraults, on the other hand. Stated otherwise, did the evidence disclose sufficient proof for jury consideration as to whether there existed a single overall conspiracy as to Counts I and II.[5]

Certain substantive counts involving the defendant Murgo, on which Murgo was convicted, raises a question. Murgo stood trial for violations of 18 U.S.C. §§ 2314 and 2, a scheme or artifice to defraud by the use of mails, whereas the evidence with respect to certain of these counts disclosed that he caused to be transmitted by wire the signs, signals or sounds for the purpose of his executing his scheme or artifice to defraud. The question was properly raised by Murgo's counsel during the trial. The Court expressed concern as to whether a jury question was presented with respect to some of these substantive counts. A check with Lexis disclosed the then recent case of *United States v. Gilboe,* 684 F.2d 235 (2nd Cir. 1982), *cert. denied,* 459 U.S. 1201 (1983), an opinion by Chief Judge Feinberg, where it is said (p. 238):

> The question whether the section [18 U.S.C. §2314] covers electronic transfer of funds appears to be one of first impression, but we do not regard it as a difficult one. Electronic signals in this context are the means by which funds are transported. The beginning of the transaction is money in one account and the ending is money in another. The manner in which the funds were moved does not affect the ability to obtain tangible paper dollars or a

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[5]In final argument, the Government conceded that, for the purposes of this case, Counts I and II should be jointly considered. In effect, then, we are dealing only with Count I—participation in a scheme to defraud Rex Baker by the use of the mails—plus the Temple conspiracy counts (Counts IV and V), Count VI affecting Murgo and Gerhardt, and the remaining substantive counts on which Murgo was convicted.

> bank check from the receiving account. Indeed, we suspect that actual dollars rarely move between banks, particularly in international transactions. If anything, the means of transfer were essential to the success of the fraudulent scheme . . . . The record amply shows that the direct transfers of precise amounts received through fraud were in a manner clearly indicating that the fraud and transfer were a single transaction. The primary element of this offense, transportation, "does not require proof that any specific means of transporting were used." *Pereria v. United States,* 347 U.S. 1, 9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1953). Therefore, since fraudulently obtained funds were transported within the meaning of the section [§2314] and banks in Manhattan were utilized, there was sufficient evidence to support jurisdiction under §2314.

The Counts affected by this ruling are X, XI, XV, XVI, XVII, XVIX, XX, XXI, XXII, XXIII, and XXVI, each of which made specific reference to wire transfers of money, but made no reference to any violation of 18 U.S.C. §1343.

Assuredly, if sentence is to be pronounced on Murgo, it would be immaterial. His scheme was a pattern of activity which must be considered in the entirety. The remaining substantive counts not involving bank wire transfers are sufficient to consider. The question to be determined is whether the Eleventh Circuit desires to follow the Second Circuit precedent ruling.

POST-TRIAL RULINGS

When the verdicts were returned, the Court allowed excess time for the filing of motions, and fixed the date for argument on all motions for May 10, 1983. Subject to the ruling on motions, the Court fixed May 11, 1983 for

sentencing. On May 10, 1983, the Court heard essentially a half-day of arguments. While the Court had intimated its concern with respect to multiple conspiracies contained within Counts I, II and III of the indictment, the arguments were not adequate.[6]

Upon reviewing its notes taken during the ten-week trial, the Court concluded that two conspiracies existed under Counts I and II of the indictment, in that Murgo, Uzzi, Antonito, Pollack, Solomons, Stephen Sarault and Aime Sarault formulated one group of co-conspirators, whereas LaSpesa, Cally and Uzzi formed the other group. In the belief of the Court at that time, there was an insufficient nexus between the two groups of conspirators, although it would appear that all co-conspirators (excepting possibly Cally) were acquainted with each other.

Without directing the preparation of perfinent portions of the transcript and directing further briefing on the issue of single versus multiple conspiracies, the Court prepared its order of May 11, 1983. The Court felt that the spillover effect of all of the evidence, especially that involving LaSpesa, had a devastating effect upon Murgo and Gerhardt and, under the mistaken belief that the entire case could be handled by the appellate court (erroneously under any circumstances), set aside the guilty verdicts and entered judgments of acquittal notwithstanding the verdicts stating as its reasons "that severances should have been granted and there is proof of multiple conspiracies." It should be noted that the Court's charge to the jury had

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[6]It is here that the Court quite obviously erred. Without the benefit of any transcript of the trial proceedings, and relying solely on several pads of notes taken during this ten-week trial, the Court, if in doubt, should have directed the preparation of at least a portion of the transcript, as it ultimately did when it granted the Government's motion for reconsideration. The difficulties in recalling specific evidence on a narrow issue involving an alleged single overall conspiracy, or a multiple conspiracy, are at best little short of impossible in such a protracted trial. The preparation of pertinent portions of the transcript have now been supplied.

submitted, under an instruction deemed to be proper, the issue and necessity of the jury believing that a single, overall conspiracy existed, and that multiple conspiracies contained within a particular count of the indictment would not justify a finding of guilt. The Court's Memorandum and Order was filed that day, May 11, 1983.

After returning to his official station in Virginia, the Court quickly came to the conclusion that it had erred in holding that the "spillover effect" as to Murgo and Gerhardt could support a judgment notwithstanding the verdict. By a writing dated May 13, 1983, filed May 16, 1983, the Court attempted to rectify its error of May 11, 1983, by preparing and filing a Supplemental Memorandum. The Court stated, in part, that "[A]n acquittal of Murgo on these Counts [Counts 4 and 5, 6 through 12, and 14 through 26] and Gerhardt on Count 6 was *not* the intended result of the Court's action," and that the Court intended, by its May 11, 1983 Memorandum and Order, to "grant a Rule 29(c) motion as to the defendants Steven Sarault, Aime Sarault, LaSpesa, Cally and Murgo as to Counts 1 and 2, and to grant a new trial as to Murgo on all remaining Counts as to which he was convicted, and a new trial as to Gerhardt on Count 6." The Court did not, however, enter any order with respect to its Memorandum dated May 13, 1983, filed May 16, 1983, as it realized that it may have lost its jurisdiction and that a possible double jeopardy issue had been injected into the case by the Court's Memorandum and Order filed on May 11, 1983.

On June 10, 1983, the United States filed its "Motion for Reconsideration of Memorandum and Order of May 11, 1983." By letter dated June 16, 1983, the Court invited counsel for the defendants to respond, together with James Cally, a defendant who appeared *pro se*. Responses were filed by the defendants, and on July 6, 1983, filed July 7, 1983, the Court granted the Government's motion for reconsideration and directed the preparation of a

transcript of the testimony of (1) Rex Baker, (2) Stephen A. Sarault, (3) Christopher Uzzi, (4) Joseph J. Beaulieu, together with that of any other witnesses who were deemed to have furnished *independent* evidence of a single, overall conspiracy. Subsequent to July 7, 1983, much delay occurred in connection with the preparation of transcripts (due largely to the fact that contract reporters were employed and changes in personnel had taken place). Further briefs were submitted by counsel for all parties, and by Mr. Cally appearing *pro se*. Finally, a final argument was conducted on February 4, 1984, at which time it was noted that other transcripts had to be provided. The Government filed, on May 4, 1984, its final Supplemental Memorandum in support of its motion for reinstatement of the jury's verdict, and the matter is ready for decision. The Government has not, as yet, filed any notice of appeal from any action by this Court.

JURISDICTION AND DOUBLE JEOPARDY

Preliminary to a resolution of the merits of the present rehearing, several threshold issues must be addressed. The undersigned had previously expressed concern with regard to the authority to entertain such a rehearing. Nevertheless, after a review of the few cases expounding on this subject, and after due consideration of the arguments raised by the government and defendants, an Order was entered on July 6, 1983, granting the Government's Motion for Reconsideration. As is their right, defendants continue to challenge the authority of this Court to retain jurisdiction after entry of a Judgment of Acquittal. Indeed, this issue was raised at the oral argument on the merits of the rehearing, conducted on February 4, 1984, and again by letter-brief subsequent to the hearing.

Defendants' persistent opposition is quite understandable in view of the relative novelty of the post-trial actions taken in this case. The Order granting the rehearing contains an admittedly cursory discussion of the complex

issues presented. Cases cited by the Court at the hearing were merely intended as supplemental authority; no further analysis or clarification was given at that time. Having since received final arguments on the matter, the following discussion is offered in explanation of the reasoning applied, for the edification of the parties and whomever else may ultimately come to review the decision.

The heading to this section indicates the two separate but interrelated issues raised by the request for rehearing: jurisdiction and double jeopardy. Opposition to jurisdiction is based primarily on the absence of explicit statutory authority granting district courts the power to reconsider a prior order, and on the premise that the entry of a judgment of acquittal operates to automatically divest the district court of jurisdiction. A judgment of acquittal also, it is argued, triggers double jeopardy protection, and prohibits further reconsideration by the district court.

Supreme Court decisions, *United States v. Healy,* 376 U.S. 75 (1964) and *United States v. Dieter,* 429 U.S. 6 (1977), have conclusively resolved that district courts may entertain timely petitions for rehearing or reconsideration in criminal cases despite the absence of any statute or rule explicitly granting such authority. These opinions recognized the simple, unassailable point that "[t]he fact that appeals are now routed to the courts of appeals does not affect the wisdom of giving district courts the opportunity promptly to correct their own alleged errors, and we must likewise be wary of imposing added and unnecessary burdens on the courts of appeals." *Dieter,* 429 U.S. at 8. A number of circuits, including the Eleventh Circuit, have since applied the principles enunciated in *Healy* and *Dieter. See, e.g., United States v. Rothseiden,* 680 F.2d 96 (11th Cir. 1982); *United States v. Rubio,* 727 F.2d 786 (9th Cir. 1983); *United States v. Marsh,* 700 F.2d 1322 (10th Cir. 1983); *United States v. Cook,* 670 F.2d 46 (5th Cir.

1982), *cert. denied,* 456 U.S. 482 (1982); *United States v. Woodruff,* 596 F.2d 798 (8th Cir. 1979); *United States v. St. Laurent,* 521 F.2d 506 (1st Cir. 1975), *cert. denied,* 423 U.S. 1049 (1976).

Recognizing the weight of this authority, defendants assert the distinction that the above cases involved reconsideration of interlocutory orders, whereas this reconsideration and rehearing concerned a final order. This difference, defendants urge, is critical because a final order divests a district court of jurisdiction, while an interlocutory order does not. A similar argument has already been rejected by the Ninth Circuit, when it stated that "[a]lthough we are presented here with a post-trial dismissal and reinstatement of an indictment, we discern, on these facts, no basis in reason or justice for distinguishing *Emens.*" *Rubio,* 727 F.2d at 799 (*United States v. Emens,* 565 F.2d 1142 (9th Cir. 1977), referred to in *Rubio,* involved a pre-trial dismissal of an indictment where a rehearing was held properly within the jurisdiction of the district court.).

Moreover, an examination of the cases applying *Healy* and *Dieter* reveals several situations involving what can only be characterized as final orders. For example, *United States v. Woodruff, supra,* involved a government request for rehearing of a judgment of acquittal that was entered by the trial court after the jury convicted the defendant—circumstances much like those in the present case. The Court of Appeals recognized the propriety of the motion for rehearing, and concluded that it tolled the running of the statutory period for the filing of an appeal.[7]

[7]Defendants argue that *Woodruff* is inapplicable because the Eighth Circuit only considered the tolling question; defendants postulate that the reason the district court in *Woodruff* denied the motion for reconsideration was that it had no jurisdiction once it acquitted the defendant. Defendants' position ignores the inescapable premise implicit in the appellate court's assumption of jurisdiction for appeal: that the district court had jurisdiction to rehear the judgment

(footnote continued on following page)

Woodruff, 596, F.2d at 799; *see also Forman v. United States,* 361 U.S. 416, 425-426 (1960) (may rehear judgment of acquittal), in conjunction with *Emens,* 565 F.2d at 1145 n.6 ("*Forman* alone is not dispositive since it involved petitions for rehearing filed in the courts of appeals rather than in the district courts. *Healy,* however, extended the rule in *Forman* to the district courts."). Likewise, in *United States v. Cook, supra,* the court explicitly held that "a petition for rehearing of a district court order affecting *final judgment* . . . is undoubtedly a legitimate procedural device." 670 F.2d at 48 (emphasis added).[8] Defendant in *Cook* requested a rehearing on the denial of a motion for new trial. Certainly defendants here would not contend that a new trial motion, requested and denied after conviction, is interlocutory in nature.

Finally, in *Zimmern v. United States,* 298 U.S. 1671 (1936), the Supreme Court held that, if done within the proper time period, a district court had plenary power to correct a prior judgment order which had already been entered and was otherwise ostensibly final. In *Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257 (1978), the Supreme Court specifically found that the district court's order granting habeas corpus relief was a

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(footnote continued)

of acquittal. Just as untimeliness bars jurisdiction in a district court, *see United States v. Robinson,* 361 U.S. 220 (1960), if the finality of a judgment of acquittal also bars jurisdiction of the district court, the Court of Appeals in *Woodruff* could not have accepted the case. A district court without jurisdiction, for whatever reason, precludes jurisdiction in an appellate court. *See Browder, infra; United States v. Martinez,* 681 F.2d 1248 (10th Cir. 1982); *Cook, supra.* Thus, in order for the court in *Woodruff* to find jurisdiction to review the merits it necessarily concluded, first, that the district court had jurisdiction to entertain a motion for rehearing after entering a judgment of acquittal, and, second, that the motion for rehearing was timely filed.

[8]There appears to be some disagreement among the circuits regarding whether a request for rehearing of a denial of a new trial motion operates to toll the running of the time for appeal. Compare *Marsh, supra* (rehearing does not toll), with *Cook, supra* (rehearing does toll). That issue is not raised by the facts of this case and therefore will not be addressed.

final order, and concluded that a timely petition for rehearing would have been effective. Although both of the foregoing cases are civil, not criminal, in nature, the decision in *Healy* rested in part on the conclusion that the practice and procedure with regard to rehearings are identical in civil and criminal cases. 376 U.S. at 78-80.

The foregoing recitation of the case law in this area reveals that the power of district courts to conduct a rehearing on a prior order is not constrained by an artificial distinction between interlocutory and final orders. The rationale underlying the Supreme Court's endorsement of the practice of allowing rehearings operates with equal vitality in either situation. Defendants' argument rests on the assumption that jursidiction of district and appellate courts is mutually exclusive and, once a judgment is final for the purposes of an appeal, the district court loses all power to act on the case. It should be evident that this argument is one of definition. The Supreme Court has spoken unequivocaly in this context: "criminal judgments are nonfinal for purposes of appeal so long as timely rehearing petitions are pending." *Healy,* 376 U.S. at 78; *Dieter,* 429 U.S. at 8; *Browder,* 434 U.S. at 268. There being no issue of timeliness in the case at hand, jurisdiction does not pose a bar to the rehearing.

The double jeopardy implications of rehearing a judgment of acquittal, however, are not so easily resolved. Extensive research on the matter indicates that the precise double jeopardy issue raised by the rehearing is heretofore unencountered, and consequently has never been addressed or resolved. This lack of guidance is exacerbated by frequent changes in the Supreme Court's position on the parameters of double jeopardy.[9] Despite these pro-

[9]*See, e.g., Burks v. United States,* 437 U.S. 1 (1978) (overruling *Bryan v. United States,* 338 U.S. 552 (1950)); *Sapir v. United States,* 348 U.S. 373 (1955), and *Forman v. United States,* 361 U.S. 416 (1960)); *United States v. Scott,* 437 U.S. 82 (1978)(overruling *United States v. Jenkins,* 420 U.S. 358 (1975)).

blems, prevailing authority applicable to the unique posture of this case, albeit by analogy, leads to the conclusion that the double jeopardy clause is not violated by the rehearing.

A judgment of acquittal has long enjoyed special status under the double jeopardy clause. *See United States v. Martin Linen Supply Co.,* 430 U.S. 564 (1977); *United States v. DiFrancesco,* 449 U.S. 117 (1980). Before the analysis can proceed the exact nature of and basis for the judgment of acquittal entered *sub judice* must be identified. This task is critical as different law may apply depending on whether an acquittal is entered due to legal error, or an evaluation of the evidence. *See Burks v. United States,* 437 U.S. 1 (1978). The latter category of cases is further divided into judgments of acquittal that are based on the weight of the evidence, or on the sufficiency of the evidence. *See Tibbs v. Florida,* 457 U.S. 31 (1982). Unfortunately, many cases are not amenable to clear distinctions between law and fact, and between weight and sufficiency of the evidence. This is such a case.

The Order granting the judgment of acquittal so held "because the evidence now clearly shows that severances should have been granted and there is proof of multiple conspiracies" Memorandum and Order, May 11, 1983, at 8. The language referring to severances indicates legal error, that there was a wrongful and prejudicial joinder of charges and defendants. Reference to multiple conspiracies, however, indicates a variance between the facts adduced at trial and the indictment charging a single conspiracy. These two points are not inconsistent. Necessarily, the prejudicial joinder arises out of and is secondary to the conclusion that there were multiple conspiracies as opposed to a single conspiracy. Thus, the judgment of acquittal was based on a perceived variance between the indictment and the proof adduced at trial. Even though the government insists that the acquittal was precipitated by the Court's erroneous understanding of the legal doctrine

of mutually beneficial schemes, the stated basis for the judgment of acquittal must surely be characterized as insufficiency of the evidence. *United States v. Plotke,* 725 F.2d 1303, 1308 (11th Cir. 1984); *see also Sanabria v. United States,* 437 U.S. 54 (1977).

Having identified that the judgment of acquittal was entered due to insufficiency of the evidence, the remaining question is whether such a conclusion may be reconsidered. The Supreme Court has issued two apparently contradictory dictates that control the outcome of this inquiry. In *United States v. Martin Linen Supply Co., supra,* the Court stated: "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." 430 U.S. at 57 (citation omitted).

In contrast to this seemingly all encompassing prohibition against review of judgments of acquittal, the Court held in *United States v. Wilson,* 420 U.S. 332 (1975), that "when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause." 420 U.S. at 382-383. According to *Wilson,* the touchstone for a violation of the Double Jeopardy Clause is whether a retrial would be necessitated by reversal. *See DiFrancesco,* 449 U.S. at 132 ("[T]he prohibition against multiple trials is the 'controlling constitutional principle'."); *see also Tibbs,* 457 U.S. at 41; *United States v. Scott,* 437 U.S. 82, 89-92 (1978).

This latter line of cases appears dispositive of the issue at hand. Reconsideration of a judgment of acquittal, by itself, does not violate double jeopardy where, as is the case here, reversal would be satisfied by a reinstatement of the original jury verdict. *See Scott,* 437 U.S. at 91 n.7 ("In

Jenkins we had assumed that a judgment of acquittal could be appealed where no retrial would be needed on remand . . . Despite the Court's heavy emphasis on the finality of an acquittal in *Martin Linen* and *Sanabria v. United States, ante,* p.54, neither decision explicitly repudiates this assumption.") Although the Supreme Court has never definitively spoken, a majority of the circuits agree with this proposition.[10]

The final argument available to defendants is that there is a difference between when an appellate court reviews a judgment of acquittal and when a trial judge reconsiders the same. Insofar as in both instances a reversal would merely result in a reinstatement of the jury verdict, there is no manifest difference cognizable under the Double Jeopardy Clause that would dictate separate treatment.[11] Consequently, this rehearing raises no double jeopardy problem, and this Court properly retains jurisdiction over the matter.

MERITS OF RECONSIDERATION

In *United States v. Kotteakos,* 328 U.S. 750 (1946), the Supreme Court held that where the evidence adduced at

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[10] *See, e.g., United States v. Burns,* 597 F.2d 939, 940 (5th Cir. 1979); *United States v. Singleton,* 702 F.2d 1159, 1161 (D.C. Cir. 1983); *United States v. Steed,* 674 F.2d 284, 286 (4th Cir. 1982) (*en banc*) *cert. denied,* 459 U.S. 829 (1982); *United States v. Uzzolino,* 651 F.2d 207, 212 n.6 (3rd Cir. 1981) *cert. denied,* 454 U.S. 865 (1981); *United States v. Blasco,* 581 F.2d 681, 683 (7th Cir.) *cert. denied,* 439 U.S. 966 (1978); *United States v. Jones,* 580 F.2d 219, 221-222 n.3 (6th Cir. 1978); *United States v. Calloway,* 562 F.2d 615, 616-617 (10th Cir. 1977); *United States v. Rojas,* 554 F.2d 938, 941 (9th Cir. 1977); *United States v. DeGarces,* 518 F.2d 1156, 1159 (2nd Cir. 1975); *but see* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3919 (after an analysis of Supreme Court cases, concludes that it is doubtful whether the government may appeal a judgment of acquittal).

[11] The result would likely be different where a trial court sitting as a fact finder at a bench trial is asked to reconsider the entry of a judgment of acquittal. *See Martin Linen Supply Co.,* 430 U.S. at 573 n.12. In that case, unlike here, there would be no prior verdict to reinstate upon reversal.

trial show multiple conspiracies, while the indictment alleges a single conspiracy, if the defendant can establish that substantial rights were prejudiced as a result of said variance, defendants' conviction must be reversed. *See United States v. Brito,* 721 F.2d 743, 746-745 (11th Cir. 1983); *United States v. Sutherland,* 656 F.2d 1181, 1190 n.6 (5th Cir. 1981) (Unit A, *cert. denied,* 455 U.S. 949 (1982). The Eleventh Circuit has made it abundantly clear that whether one or more conspiracies exist is a question of fact for the jury to decide. *United States v. Carter,* 721 F.2d 1514, 1531 (11th Cir. 1984); *United States v. Lee,* 695 F.2d 515, 518 (11th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 130 (1983). This rule holds true especially where the jury was properly instructed, as here[12], that they

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[12]The jury was instructed as follows with regard to finding a single as opposed to multiple conspiracy:

> Before getting into the details of the counts in the indictment remaining for your consideration, I must point out to you that, with respect to the two conspiracy counts (Counts 2 and 5), while all defendants by their pleas of not guilty have denied that any conspiracy existed and, even if a conspiracy existed, have further denied that they were a party to such conspiracy, yet with regard to these alleged conspiracy counts I must tell you that proof of several separate conspiracies within one count of the indictment is not proof of the single, overall conspiracy charged in that particular count of the indictment.
>
> What you must determine is whether the single conspiracy existed between two or more conspirators. Of course, if you find that no such single, overall conspiracy existed, then you must find all defendants not guilty as to that particular conspiracy charge. However, if you are satisfied beyond a reasonable doubt that a single, overall conspiracy existed, you must then determine who were members of that conspiracy.
>
> If you find that a particular defendant was a member of another conspiracy—not the conspiracy charged in the indictment—then you must acquit that defendant. In other words, to find a defendant guilty under a count charging a conspiracy, you must find that he was a member of the conspiracy charged in the indictment and not some other, separate conspiracy.

(Footnote continued on following page.)

must find the single conspiracy charged, and not multiple conspiracies, in order to convict. *See Plotke,* 725 F.2d at 1308. Nevertheless, this rule does not allow courts to abdicate their primary responsibility of insuring that there is sifficient factual support of a single conspiracy prerequisite to submission of the issue to the jury.

Prior to entering the Judgments of Acquittal, this Court concluded that such a prejudicial variance had occurred. As was indicated in the section entitled "Post-Trial Rulings," the specific grounds on which the undersigned found two conspiracies instead of the single conspiracy charged in the indictment was the belief that the government failed to show a sufficient nexus between the two apparent groups of co-conspirators: on the one hand, Murgo, Uzzi, Antonito, Pollack, Solomons, and the Saraults; on the other hand, LaSpesa, Cally and Uzzi. This finding is the sole question to be reviewed in the present reconsideration. Evidence of a nexus will be viewed in a light most favorable to the government, with all reasonable inferences drawn in its favor. *Plotke,* 725 F.2d at 1308, citing *Glasser v. United States,* 315 U.S. 60, 80 (1942). *See also, United States v. Lee,* 695 F.2d at 517.

(Footnote continued.)

> The principal factors you may consider in determining whether a single, overall conspiracy existed or whether there were multiple conspiracies disclosed by the evidence as within the alleged single, overall conspiracy, include the existence of a common goal, the nature of any scheme, and the overlapping, if any of participants in the various dealings alleged in the conspiracy counts.
>
> The fact that two separate conspiracies are separately charged in Counts 2 and 5 of the indictment is permissible. One of the questions you must determine is whether there was a single, overall conspiracy in each particular conspiracy count, or whether there were multiple conspiracies within either of these counts.

Tr. March 25, 1983, at 4, 5.

The government argues that the two ostensibly separate groups in this case may be bound into a single conspiracy because a "mutually beneficial scheme" has been shown. *See United States v. Cole*, 704 F.2d 554, 557 (11th Cir. 1983). Where otherwise seemingly independent conspirators need one another for the continued prosperity and survival of their own particular enterprise, this need, in effect, envelopes these groups in a single, continuous scheme that relies upon and contemplates their interdependent parts.

Much of the post-trial debate has focused on whether the doctrine of mutually beneficial schemes applies to the facts of this case, or whether the facts constitute a "wheel," "rim," "hub," or "chain" conspiracy. This focus on different subcategories recognized in the law of conspiracy is, however, misleading and artificially constraining. "Conspiracies are as complex as the versatility of human nature and federal protection against them is not to be measured by spokes, hubs, wheels, rims, chains, or any one or all of today's galaxy of mechanical molecular or atomic forms." *United States v. Perez*, 489 F.2d 51, 59 n.11 (5th Cir. 1973); *see also United States v. Elam*, 678 F.2d 1234, 1246 (5th Cir. 1982).

The essence of a single conspiracy, simply put, is an overall scheme or objective for which purpose individual members have agreed to participate—their particular role or function is of no consequence as long as the shared objective and the agreed upon blueprint for achieving that objective is the binding force. "The principal factors involved in determining whether there has been a prejudicial variance between an allegation of a single conspiracy and proof at trial of multiple conspiracy are the 'existence of a common goal, the nature of the scheme and an overlapping of participants in various dealings.' " *Lee, supra*, 695 F.2d at 518 (citation omitted); *Plotke, supra*, 725 F.2d at 1308. "The agreement constitutes a single conspiracy if the agreement contemplates bringing to pass a continuous

result that will not continue without the continuous cooperation of the conspirators to keep it up." *United States v. Hess,* 691 F.2d 984, 988 (11th Cir. 1982), citing, *United States v. Solomon,* 686 F.2d 863, 871 (11th Cir. 1982).

Applying the preceding formula to the facts of this case as now revealed by the transcript, there is little question but that the jury was provided with sufficient evidence from which to find a single conspiracy. The overall objective was plainly to make money; the plan devised and implemented to make money was an advance fee scheme; there was a definite overlap between the participants (evidenced by the relationships between Murgo and LaSpesa, Murgo and the Saraults, the Saraults and LaSpesa, and Uzzi, Murgo and LaSpesa); finally, each needed the other for the continued success of the scheme, to pass on victims and to forestall their suspicions and fears, meanwhile exacting a price at each successive level. *See generally, Hess, supra.*

Indeed, defendants' scheme, as ingenious as it is deceptive, is no less a single conspiracy for its subtlety and many freeflowing parts. A similarly complicated scheme was described as follows by the Fifth Circuit in a fashion strikingly reminiscent of the facts in this case:

> [t]he teaching of the cases as applied to the present one, is that the defrauding of different people over an extended period of time, using different means and representations, may constitute but one scheme. Naturally, by clear analogy it does not make any difference that the various deceptions were practiced at different places. Nor is it significant that the whole scheme was not planned out in advance. A continuing "intention to devise it," . . . or an imperfectly conceived plan to defraud which becomes more and more sophisticated and grandiose as the plan progresses and the assets of the

> more guillible victims are exhausted, may well constitute a single scheme.

Owens v. United States, 221 F.2d 351, 354 (5th Cir. 1955), quoted in *United States v. Mastelotto*, 717 F.2d 1238, 1245 (9th Cir. 1983).

An advanced fee scheme relies for its successful perpetuation on an infusion of new potential sources of funding to whom increasingly disgruntled prospective borrowers may be sent. Defrauded clients are moved along quickly—but not before they have paid that additional fee to "finally obtain results"—so that the developing pattern of prior disappointments is less evident as the prospective borrower is urged to look forward with renewed hope. "The very nature of this conspiracy required personnel changes in order for it to continue." *Plotke*, 725 F.2d at 1308. Necessarily, each "new source" is in on the fraudulent scheme, for a legitimate enterprise poses the risk of recognizing the scam and might alert the prospective borrower.

Thus, the group headed by LaSpesa was an integral segment of and valuable to the overall conspiracy in large part because of its appearance of separateness. This fresh appearance made him attractive to clients as an untapped source of funding, and it was this very same appearance that initially led this Court to the conclusion that two conspiracies were established. Only with the benefit of a transcript can this illusion be pierced and the nexus between the LaSpesa group and the original Murgo group definitively identified.

Counts One and Two of the indictment focus on the scheme to defraud Rex Baker. Consequently, Baker was in a unique position to testify with regard to the relationship between these two groups. LaSpesa's role appears to have changed somewhat during the pendency of the scheme, but the character of his position remained as the same reassuring source of funds.

On or about August 29, 1980, just after Baker had received the unsigned letter of commitment from Merchants' Bank of Commerce (Anguilla), Limited, Baker went to Murgo's office and told Murgo that financial information about Merchants' Bank must be supplied if the guarantee was to be recognized. [Tr. February 15, 1983, at 160]. In response to this concern, Murgo called LaSpesa, with Baker present and following the discussion on a speaker phone, and received authorization from LaSpesa to release to Baker a financial statement of Merchants' Bank [Tr. February 15, 1983, at 160]. It was Baker's understanding that LaSpesa was a major stockholder in and the President of Merchants' Bank. Baker was promptly handed a copy of the financial sheet of the bank, with a cover letter attached on the stationery of Murgo & Sanborn Associates stating that the financial statement was being supplied for use in conjunction with the letter of commitment. See Government's Exhibit 550. [Tr. February 15, 1983, at 160-162]. The cover letter indicated a copy was sent to LaSpesa at Cally's New York law office [Tr. February 15, 1983, at 162]. Significantly, Murgo assured Baker at the time that it looked like a good financial statement to back up the guarantee. [Tr. February 16, 1983, at 6].

Predictably, the banks at which Baker presented the letter of commitment and financial statement nevertheless rejected his request for a loan. Baker then called Stephen Sarault, on or about September 2, 1980, advising him of this lack of success. [Tr. February 16, 1980, at 7]. Sarault expressed surprise and dismay that Baker had obtained the financial statement of Merchants' Bank, despite the fact that LaSpesa had authorized its release, and he cancelled the letter of commitment effective immediately—which was easily accomplished since the letter was unsigned anyway. [Tr. February 16, 1980, at 7-8].

Baker contacted Uzzi soon thereafter and set up a meeting with LaSpesa in New York to be held on October

8, 1980, to discuss the cancellation of the commitment; LaSpesa, however, was unavailable, and Baker returned home without having seen LaSpesa. [Tr. February 16, 1980, 8-11]. Meanwhile, Uzzi assured Baker that LaSpesa had the final word on the commitment, and, after the meeting with LaSpesa fell through, Uzzi represented to Baker that LaSpesa would provide the guarantee for a one point commitment fee. [Tr. February 16, 1980, at 9, 11-12].

Baker again went to New York, on October 22, 1980, this time accompanied by two other prospective borrowers, Diem and Gilmore, and Diem's attorney O'Hare, to meet with LaSpesa and Uzzi at Cally's law office. Present at this meeting were Baker, Diem, Gilmore, O'Hare, LaSpesa, Cally, and Uzzi [Tri. February 16, 1983, at 14-15]. LaSpesa indicated that for a one percent commitment fee he would come up with a guarantee and assist with procuring the funding. [Tr. February 16, 1983, at 15-16]. Diem and Gilmore turned over the one percent required for their project, but Baker did not have the money to do likewise. [Tr. February 16, 1983, at 17-18]. LaSpesa assured Baker that he would do the same for Baker as he did for Diem and Gilmore, albeit once the fee was paid. [Tr. February 17, 1983, at 73-74].

Baker also testified about receiving two letters, both highly probative of the connection between the Murgo group and the LaSpesa group. The first letter, dated October 16, 1980, from Murgo & Sanborn Associates (Canada), states in pertinent part: "We are pleased to report to you that the principal shareholder in the Bank has authorized us to inform you that he will positively assist in the funding of the Letter of Credit." See Government's Exhibit 551; [Tr. February 16, 1983, at 20]. As was stated earlier, Murgo told Baker that LaSpesa was the principal shareholder of Merchants' Bank [Tr. February 15, 1983 at 160; Tr. February 16, 1983, at 21]. The second

letter, dated December 8, 1980, also sent to Baker from Murgo & Sanborn Associates (Canada), reads:

> Dear Sir, In view of the fact that we have had some difficulty in funding the commitment from the Merchants Bank of Commerce of Anguilla, and LTD [*sic*], Mr. Joseph LaSpesa, principal shareholder, has purchased another bank. We have been advised that this bank has prime bank correspondence [*sic*] who are internationally accepted by funding entities.
>
> Mr. LaSpesa has informed us that he will do everything possible to assist our clients right after the new year . . .

[Tr. February 16, 1983, at 24-25]. Both of these letters were signed by Solomons, President of the Canada branch of Murgo and Sanborn Associates.

In addition to the foregoing letters, Uzzi, the only participant in this complicated scheme who operated on the inside with both Murgo and LaSpesa, confirmed the essentials of what Baker attested to with regard to LaSpesa's link with Murgo. Uzzi testified that he and Murgo discussed the problems prospective borrowers were having obtaining loans because of the weak guarantees they were provided. [Tr. February 17, 1983, at 156]. During that discussion Murgo expressed confidence that things would change now that LaSpesa had acquired Merchants' Bank. [Tr. February 17, 1983, at 156, 159]. Murgo was clearly well-informed about LaSpesa's dealings. Subsequent to this discussion, Uzzi came to meet with LaSpesa several times. On one occasion, in September of 1980, in Cally's office, LaSpesa assured Uzzi that he would honor Sarault's letters of intent, including that issued to Baker. [Tr. February 17, 1983, at 172; Tr. February 18, 1983, at 68]. In specific reference to Baker, LaSpesa indicated to Uzzi that Baker would get a letter of credit if he paid the

one percent fee. [Tr. February 17, 1983, at 197; February 18, 1983, at 84]. Uzzi remained in close contact with Murgo throughout in regard to their respective dealings with Merchants Bank, and it was Murgo who told Uzzi that LaSpesa was in the process of acquiring another bank sometime in late 1980. [Tr. February 17, 1983, at 226-227].

The basics related to by Baker and Uzzi were corroborated by a few other witnesses, and no significant impeachment was effected by defense counsel. Of course, some of the more self-serving statements made by Uzzi must be viewed in light of his complicity in the scheme. Taken as a whole, a simple scenario may be drawn as the clearly evident pattern of deception presents itself. At the first level, Murgo and Solomons each took their piece of the pie from Baker. Baker's substantial initial investment effectively hooked him for further taking. On the second level, Uzzi, Antonito, and Pollack received their cut from Baker for a letter of intent, to be issued in conjunction with one drawn by Sarault's Merchants' Bank. Baker balked when Sarault requested an additional fee, especially when he was informed that Sarault had already received a share of the money he previously paid. The unsigned letter of commitment issued by Merchants' Bank was a carrot, designed to induce further cooperation and to give the appearance of action and results. Of course, as intended from the beginning, nothing came of the letter of commitment and it was cancelled. Then, on the third level, comes LaSpesa. He too wants a cut, but the stakes become significantly higher. Baker is encouraged, however, by Murgo and Uzzi constantly raising false hopes to assure Baker that he was getting something for his money. That is why Murgo needed LaSespa. LaSpesa, on his part, recognized a perfect set-up and readily joined in to get his piece of those made ripe for the picking by Murgo and his confederates. Also, his financial credibility was dependent upon and established by Murgo. LaSpesa needed Murgo for ready made clients; clients who would not probe too deeply into his financial background.

On each successive level: money is taken up front; the illusion of results is created; the deal falls through; the prospective borrower is sent to the next level. Ultimate success depends on a continual flow of new levels. Thus, while LaSpesa is admittedly a newcomer on the already commenced scheme, his role, though not his identity, was contemplated from its inception. Likewise, the fact that prior participants such as the Saraults would fade into the background was also contemplated by the overall scheme. Therefore, neither the Saraults' departure, nor LaSpesa's joinder had the effect of breaking up the old conspiracy or creating a new one.[13] The scam continues until the prospective borrower gives up, wises up, or is financially drained and thus unattractive for further purposes. Similar to most sophisticated financial schemes to defraud, expansion and the changing of actors was an integral part of its nature. *See Plotke, supra; Perez, supra.* "It would be a 'perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one.' " *Perez*, 489 F.2d at 63, quoting *United States v. Palermo,* 410 F.2d 468, 470 (7th Cir. 1969). The nexus between the Murgo group and the LaSpesa group is now manifest.

Accordingly, this Court concludes that its original entry of the Judgment Acquittal was in error. The evidence

[13]Defendants cite *United States v. Camiel*, 689 F.2d 31 (3rd Cir. 1982), in support of the proposition that the apparent disagreement between the Saraults and LaSpesa precludes a finding of a single conspiracy. The defendants in *Camiel*, however, were always at odds, and at no time worked together under a single scheme. In contrast, here, LaSpesa and the Saraults initially worked intimately together. Furthermore, the scheme in this instance, unlike that in *Camiel*, contemplated that the Saraults would leave the forefront, and someone else would take their place as the primary source of the guarantee. That someone else turned out to be LaSpesa. Because the conspiracy involved a change in the participants, the Saraults cannot contend that they withdrew from the conspiracy or that the original conspiracy was terminated.

previously recited in this memorandum, when viewed in a light most favorable to the government, surely provides sufficient evidence from which the jury could find a single conspiracy in which all of the defendants on trial under Count I participated. Since the issues of improper joinder and prejudicial spillover effect hinged entirely upon a finding of multiple conspiracies (with the exception of Gerhardt, discussed in footnote 3, *supra*), they need not be further addressed.

Upon presentation of an appropriate order, the judgments of acquittal will be VACATED; all of the jury verdicts will be REINSTATED; and the judgments of guilty ENTERED. A new trial will be GRANTED as to Gerhardt, with the understanding that the government will dismiss the charges as to him.

WALTER E. HOFFMAN
Senior United States District Judge
(Under designation)

At Norfolk, Virginia
August 20, 1984

Judgment of Acquittal.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

Orlando Division

UNITED STATES OF AMERICA

vs.

VICTOR E. MURGO, *et al.*

No. 82-67-Orl-Cr-R(H)

Memorandum and Order

The trial of the remaining defendants, Murgo, Williams, Stephen Sarault, Aime Sarault, La Spesa, Mancini, Cally and Gerhardt, commenced on January 10, 1983 before the undersigned visiting judge sitting by designation.

In pretrial proceedings motions to sever were filed by the defendants under Rule 8(b), F.R.Cr.P. Briefs were filed and arguments conducted. On December 30, 1982, Judge Young denied the motions to sever *without prejudice to their being raised at a later date.* In a footnote to his order, the District Judge said:

> "The motions to sever (other than Pollack's supplemental motion based on alleged physical ailments [which motion was later granted]) are

> grounded on the claim that there are separate conspiracies alleged which should not be joined in one conspiracy count and in the same indictment. This Court does not have knowledge of what the evidence in the case will disclose and, therefore, at this time cannot conclude that the evidence would support, as the Government contends, one conspiracy, or as the defendants contend, more than one conspiracy. Government counsel is privy to the anticipated evidence and proceeds at his own risk, because if defendants should be correct a mistrial could conceivably be required with a waste of time, effort and expense on the part of both the Government and the defendants."

The trial concluded on March 30, 1983, with the jury being unable to agree as to the guilt or innocence of the defendant, Williams, on Counts IV and V, and unable to agree as to the guilt or innocence of the defendant, Mancini, on Counts I and II. All defendants were found not guilty as to Count III.

The remaining defendants then on trial were found guilty on Counts I (the Rex Baker scheme to defraud by the use of mails) and II (the conspiracy by the use of mails to defraud Baker), except Williams as to whom a directed verdict of acquittal was granted by the Court at the conclusion of the Government's evidence. Murgo, the hub-of-the-wheel, was found guilty on Counts IV (the Temple scheme to defraud) and V (the conspiracy by the use of mails as to Temple). Sidney Gerhardt and Murgo were found guilty on Count VI, a substantive count involving 18 U.S.C. §2314. Murgo was also found guilty of Counts Seven, Eight, Nine, Ten, Eleven, Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five and Twenty-six. Counts Thirteen and Twenty-seven through Thirty-two were dismissed on motion of the Government.

It would, of course, be nearly impossible to conduct a jury trial of over ten weeks duration without some error creeping into the trial. However, in the final analysis, the resolution of this case depends upon whether the evidence demonstrates that there were multiple conspiracies or one single overall conspiracy. This issue was left to the jury which concluded the matter adversely to the defendants. The alternative question, closely allied to the foregoing, is whether the defendants should have been served under Rules 8(b) and 14.

The Temple-conspiracy and scheme to defraud, Counts IV and V, present no great problem as Murgo was the only convicted defendant on these counts. However, Counts IV and V are wholly unrelated to Counts I and II as the Government concedes. That a conspiracy existed between Murgo, Beaulieu, and Solomons [now in Canada and cannot be extradicted without a showing of proof that he is probably guilty] cannot be doubted. As to Williams, since the jury did not agree as to his guilt or innocence, it can only be said by the Court that there was clearly enough evidence to go to the jury on Counts IV and V. The defendant, Michele Beverelli, was not on tiral and presumably has returned to his home in Italy. Without suggesting his guilt or innocence, it can only be said that, from the evidence thus far adduced as to Beverelli, his participation in any fraudulent scheme or conspiracy was so miniscule that the prosecution of him is not worth the expense involved.

As to the defendants who were tried, there is no question but that they were guilty of crimes. Murgo, Stephen Sarault, Aime Sarault, La Spesa, and Gerhardt were all "con" men engaged in efforts to fleece prospective borrowers of substantial sums of money without any thought that they could ever fulfill any expectations of finding the sources of financing. Cally, a New York attorney, clearly participated by aiding and abetting his client, La Spesa, and thus participating in a conspiracy with La Spesa. His

conduct went far beyond the reach of a normal attorney-client relationship.

But each defendant conducted his "con" efforts by his own actions, aided by a few others on each occasion. That they had a common purpose cannot be doubted, i.e., to "milk" the potential loan applicants as much as possible and holding them "on the fence" as long as possible in hopes of receiving more money.

The most recent case on multiple versus single conspiracies is *United States v. Cole,* ____ F.2d ____ (11th Cir., May 2, 1983), an opinion by Chief Judge Godbold. While the convictions were affirmed because a mutually beneficial scheme was established in that the men and women involved conducted their life style in a common or joint operation, a review of the notes of the undersigned in the present case (no transcript has been prepared) discloses no mutually beneficial scheme unless it is to be said that all parties who conduct fleecing operations on potential loan applicants have a mutually beneficial scheme.

No case called to my attention has gone as far as the Government now seeks to go. In all probability, *United States v. Marionneaux,* 514 F.2d 1244 (5th Cir. 1975) (an opinion by Judge Roney), is closest in point, but even this case cannot be said to be fully applicable. It does, however, discuss Rule 8, F.R.Cr.P., and the two conspiracy counts alleged therein, each being obstruction of justice, with the Court of Appeals reversing because of failure to grant a severance.

In our case, the Government proceeded at its own risk. The Court now holds that it was in error in not concluding as a matter of law, that the proof in this case demonstrates multiple conspiracies and that motions to sever should have been granted, at least in part.

It can be argued that Murgo's convictions on the substantive counts and Gerhardt's conviction on Count VI (along with Murgo), as well as Murgo's conviction on Counts IV and V (the Temple transactions) should not be

disturbed. However, the spillover effect of other evidence, especially that involving La Spesa, is bound to have had a devastating effect. *Schaffer v. United States,* 221 F.2d 17 (5th Cir. 1955); *Barton v. United States,* 263 F.2d 894 (5th Cir. 1959).

I have no problem with the motion to suppress filed by Murgo. A review of the application for the search warrant and the accompanying affidavit of Agent Richardson demonstrates clear probable cause, and the fact that the search involved a thorough examination of many papers, records, documents, notes, etc., does not convert the proceeding into a "general search."

I am still concerned whether certain Murgo counts charging a violation of 18 U.S.C. §1341 may be upheld where the evidence establishes that the money was sent by wire, a violation of 18 U.S.C. §1343 which was not charged in this indictment, but the Second Circuit, in an opinion by Chief Judge Feinberg, has ruled that money sent by wire may be used to support a charge under 18 U.S.C. §1341 and, in the absence of any other authority, I feel obliged to follow the Second Circuit.

Accordingly, the case having been fully heard and verdicts of guilty returned, in accordance with Rule 29(c), the motions to set aside the guilty verdicts and enter judgements of acquittal notwithstanding the verdicts are reluctantly SUSTAINED, because the evidence now clearly shows that severances should have been granted and there is proof of multiple conspiracies. The Government may, in its judgment, perfect its appeal.

DONE and ORDERED in Chambers at Orlando, Florida, this 11th day of May, 1983.

WALTER P. HOFFMAN
Senior United States District Judge
(Under designation)

Petition for Rehearing.

IN THE

UNITED STATES COURT OF APPEALS,

FOR THE ELEVENTH CIRCUIT.

In Re:

JAMES J. CALLY,

Petitioner.

Docket No. 84-3614

Petition for Rehearing and Suggestion that Rehearing be En Banc.

TO THE HONORABLE JUDGES OF THE ELEVENTH CIRCUIT COURT OF APPEALS:

JAMES J. CALLY petitions for a rehearing to reconsider the order entered in this action of September 20, 1984 denying the application for a Writ of Mandamus.

A petition for rehearing is requested because the undersigned petitioner had submitted a simplified request for the Writ of Mandamus, whereas and in fact, he should have stressed the novel issues presented therein and that the petitioner had no recourse but to make the said application since no other remedy is available.

STATEMENT OF THE ISSUES

The issues raised by the purported memorandum decision of Judge Walter E. Hoffman are as follows:

1. Does the District Court have jurisdiction to vacate a Judgment of Acquittal after the same had been entered some fifteen [15] months last past?

2. Does such attempt by the District Court place this petitioner in double jeopardy?

3. Is this Court empowered to protect the petitioner's double jeopardy rights?

These and other issues evolving from the purported actions of the District Court present novel questions and those of first impression; therefore, it would appear that such issues merit an *en banc* consideration.

PRIOR PROCEEDINGS AND DISPOSITION

This petitioner and others went to trial on an indictment in United States District Court, Orlando Division in and about January 10, 1983, and the said trial consummed upwards of ten [10] weeks to try. The Jury brought in a verdict of guilty as to all the parties save two, whereupon a date for motions was set down by Judge Walter E. Hoffman, to-wit: May 10th, 1983, and a sentencing was set for May 11, 1983. After Court heard all arguments on motion made to set aside the jury verdict and acquit the defendant, the said Judge Walter E. Hoffman entered a Judgment of Acquittal as to all of the defendants. The Judgment was entered with the Clerk of the Court, and parties released in their recognizances.

Approximately thirty [30] days after the entry of the said Judgment of Acquittal, the Government moved for a

reconsideration of the decision. The application was treated as a petition for rehearing, and the said Judge entertained it. Whereupon, all the parties therein were given an opportunity to respond. The proper objections were made that the Court had no jurisdiction and that double jeopardy would ensue. After some fifteen [15] months elapsed, the purported memorandum decision came down from Judge Walter E. Hoffman, which proposes to nullify the final judgment and sentence the remaining individuals, including your petitioner.

ARGUMENT AND AUTHORITIES

This petition is predicated upon the following grounds:

1. In the opinion of the petitioner, the Court has overlooked or misapprehended the application for the Writ of Mandamus in the instant matter.

The district court order granting reconsideration of its earlier final judgment of acquittal is not a final decision justifying appeal under 28 U.S.C. §1291, because it does not end the litigation. Nor is the order appealable under the Interlocutory Appeals Act, 28 U.S.C. §1292. The only final order in this case which was even arguably appealable was the judgment of acquittal which the Government chose not to appeal even after having been invited to do so by the District Court. The only recourse to challenge the District Court's proposed illegal actions is to petition this Court for Writ of Mandamus.

It should be noted that it has been more than fifteen [15] months since petitioner was acquitted. Had the Government simply attempted to appeal the judgment of acquittal, this case would have been long since concluded one way or another. Instead, the Government has done everything else but appeal as advised by the District Court to do so. Unless this Court acts to issue the Writ, much time and money will be spent for naught, resulting in a miscarriage

of justice. Accordingly, even assuming the District Court enters another order in this case which might traditionally be viewed as an appealable order, something it has not yet done and something petitioner argues it has no jurisdiction to do, this Court should nevertheless use its supervisory powers to rule on the Writ so that further needless delays and suffering might be prevented.

2. Although the Writ is a drastic remedy, the Supreme Court has consistently stated it is available when a lower court acts beyond its jurisdiction. "[T]he 'traditional use of the writ in aid of appellate jurisdiction both at common law and in federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Will vs. Colvert Fire Insurance Company,* 437 U.S. 655, 661 (1978), *quoting from Roche vs. Evaporated Milk Association,* 319 U.S. 21, 26 (1943).

As early as 1897, the Supreme Court held that the Writ was appropriate to vacate an order improperly granting a rehearing in an action at law after the Supreme Court's mandate. *In re Potts,* 166 U.S. 263 (1897). In *Delaware, L. & W. R. Co. vs. Rellstab,* 276 U.S. 1 (1928), Justice Holmes wrote that where a district court is without jurisdiction in vacating a judgment, the court of appeals must grant Mandamus to compel reinstatement of such judgment. As Justice Holmes noted: "It certainly would be unjust to leave the case in the air, because the District Court had made an unwarranted attempt to set aside a judgment that it had no jurisdiction to touch." *Id.* at 5. *See also Madden vs. Perry,* 264 F.2d 169 (6th Cir. 1959). (Mandamus is the appropriate remedy to compel court to vacate supplemental findings of fact and conclusions of law when it acted beyond its jurisdiction); *Butcher & Sherrerd vs. Welch,* 206 F.2d 259 (3rd Cir. 1953). (Where lower court is without jurisdiction to vacate judgment, mandamus is the appropriate remedy); *Three J. Farms, Inc.*

vs. Alton Box Board Co., 602 F.2d 112 (4th Cir. 1979). (Since federal court lacked jurisdiction to vacate its original order remanding case to state court, Writ of Mandamus was appropriate).

The Supreme Court has also pointed out that it does not matter whether the District Court's act was right or wrong; if it exceeded its jurisdiction, Mandamus is appropriate. *In re Metropolitan Trust Company of the City of New York*, 218 U.S. 312 (1910). Furthermore, the fact that objection to jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a Writ of Mandamus at the outset. *In re State of New York*, 256 U.S. 490 (1921). *See also People of Guam vs. District Court of Guam*, 641 F.2d 816 (9th Cir. 1981).

3. In *United States vs. Dunbar*, 611 F.2d 985 (5th Cir. 1980) *(en banc)*, the Fifth Circuit held that denial of a double jeopardy motion does not divest the district court of jurisdiction to proceed with trial if the district court has found the motion to be frivolous. The Court noted that the availability of a writ of mandamus or prohibition provided sufficient safeguards against infringement of a defendant's double jeopardy right not to be tried pending an appeal from the denial of a nonfrivolous motion: "This Court is, of course, empowered to protect the defendant's double jeopardy rights . . . by issuing a writ of mandamus or prohibition, 28 U.S.C.A. §1651." *Id.* at 989. *See also Ruby vs. Secretary of United States Navy*, 365 F.2d 385, 389 (9th Cir. 1966), *cert. denied*, 386 U.S. 1011 (1967).

4. In *United States vs. Mehrtens*, 494 F.2d 1172 (5th Cir. 1974), the government sought both a writ of mandamus to compel the district court to vacate an untimely Rule 35 order reducing sentence and an appeal from the same order. The Fifth Circuit found that, because the district court lacked jurisdiction to grant the Rule 35 Motion, the writ of mandamus was the appropriate remedy.

See also United States vs. Norton, 539 F.2d 1082 (5th Cir. 1976).

In the present case, petitioner contends that because he was acquitted, the district judge lacks jurisdiction to sentence him at all, much less 15 months after the acquittal. Just as in *Mehrtens* and *Norton,* the proper remedy for such an usurpation of jurisdiction is the Writ of Mandamus.

5. On May 11, 1983, petitioner was acquitted of all charges against him. An order of acquittal was entered. No notice of appeal was filed by the Government. As argued throughout this petition, the District Court lacks jurisdiction to disturb the final judgment of acquittal. Yet, the District Court has failed to enforce the valid judgment of acquittal it has entered.

Enforcement of a valid judgment is a ministerial act over which the District Court had no discretion. Mandamus lies to compel a lower court to perform a ministerial function. *Weber vs. Coney,* 642 F.2d 91 (5th Cir. 1981).

By failing to execute its valid judgment of acquittal, the Court has failed to exercise a duty entrusted to it and follow its own mandate. *Whitlock's Estate vs. C.I.R.,* 547 F.2d 506 (10th Cir.), *cert. denied* 430 U.S. 916 (1976); *Yablonski vs. United Mine Workers of America,* 454 F.2d 1036 (C.A.D.C.), *cert. denied* 406 U.S. 906 (1971). *See also Bucolo vs. Adkins,* 424 U.S. 641 (1976); *in re Olson,* 727 F.2d 1015 (11th Cir. 1984).

6. Review by mandamus is proper where the order under attack is characteristic of an erroneous practice which is likely to recur. *See, e.g., La Buys vs. Howes Leather Co.,* 352 U.S. 249, 258 (1957); note, *Supervisory and Advisory Mandamus Under the All Writs Act,* 86 Harv.L.Rev. 595, 610 (1973). Here, unless this Court stops the practice once and for all, the Government will

consistently ask district courts to reconsider judgments of acquittal instead of appealing the cases under 18 U.S.C. §3731 (1982). Difficult jurisdictional and double jeopardy questions will be raised and cases will be dragged out for years. This Court should take the present opportunity to stop this erroneous practice, which is bound to recur.

Mandamus has also been found proper where the order under attack presents a novel and important question in which there is a need for guidelines which would, if set forth, be useful for the resolution of similar cases. *See Schlagenhauf vs. Holder,* 379 U.S. 104, 111-12 (1964); note, *Supervisory and Advisory Mandamus under the All Writs Act, supra,* 86 Harv.L.Rev. at 618-19. The District Court and all parties agree that this case is one of first impression and that it raises important and complex questions of jurisdiction and double jeopardy. Such a case is one of the few appropriate for supervisory mandamus.

Since an order of acquittal is a final judgment rather than an interlocutory order, the District Court loses jurisdiction the instant it enters an order of acquittal. The Government has thirty days to appeal the acquittal under 18 U.S.C. §3731. If the notice of appeal is timely filed, the Court of Appeals assumes jurisdiction and may reinstate the conviction as long as it would not require retrial. *United States vs. Wilson,* 420 U.S. 332 (1975). However, unless the Court of Appeals orders the district court to reinstate the jury's guilty verdict the district court can never amend its final judgment once it is entered. Any action taken by the district court after entry of final judgment is, at best, an ordinary memorandum without any effect on the actual final judgment.

It is respectfully requested that the petitioner be allowed to adopt the arguments brought forth by counsel for Victor Murgo in his application for a Writ of Mandamus. Petitioner believes these points are cogent and worthy of *en banc* consideration for the following reasons:

a. That it will meet the requirements of the case law as heretofore existed under the Federal jurisprudence, as well as, the statutory enactments.

b. It will, for all time settle the issue that the finality of a judgment shall be upheld by the lower court, and if recourse is to be had further that the same be by appeal, to the appropriate court.

c. It will likewise deter a waste of time, money, and unnecessary expense to the litigants once the issue has been disposed.

The issues raised herein are novel and present questions which have never before been passed upon, and, therefore, must be concluded by this Court.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant a rehearing *en banc,* or, in the alternative, submit the same before the panel who originally decided the Petition for a Writ of Mandamus for a reconsideration of the issuance of the said Writ.

Dated: 4th day of October,
1984.

JAMES J. CALLY
Defendant *Pro Se*
150 Broadway
New York, New York 10038

Order.

IN THE

UNITED STATES COURT OF APPEALS,

FOR THE ELEVENTH CIRCUIT.

In Re:

JAMES J. CALLY,

Petitioner.

No. 84-3614

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

On Petition for Rehearing and Suggestion for Rehearing En Banc

(Order of September 20, 1984)

(OCT 25 1984)

Before Godbold, Chief Judge, Kravitch and Hatchett, Circuit Judges.

Per Curiam:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing *En Banc* is DENIED.

Entered for the Court:

illegible
United States Circuit Judge

APPENDIX B

Statutes

CONSTITUTIONAL AMENDMENTS

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for

payment of pensions, and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for loss or emancipation of any slave; but all debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.